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2007

No. 07-142

IN THE

Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE TO VETERANS CORPORATION, PETITIONER

v.

BILL WICKERSHAM; MAUREEN DOYLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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STATEMENT

Contrary to respondents' statements at page 3 of their brief:

The City is **not** responsible for operating the airport during the air show. Although the airport is owned by the City, the contract between Salute and the City gives Salute exclusive control of the airport during the event, subject to the City's right to retake control in the event of an emergency. Pet. App. 3a.

The City does **not** coordinate with the Federal Aviation Administration ("FAA"), and the City does **not** have primary responsibility for the "Ground Operations Plan." Salute, not the City, must submit the Ground Operations Plan to the FAA. Pet. App. 68a. Salute, not the City, appoints the "Air Boss," who is a qualified volunteer and not a City employee. The airport manager and other key people such as the air traffic controller, FAA representative, fire chief, and police captain attend the Air Boss briefings. App. 69a. But the briefings are not City meetings, and they are not attended by City administrators or council members. The briefings occur early in the morning of Saturday and Sunday of the Memorial Day weekend, shortly before the air show begins. Posner Depo. at 114. The Air Boss briefings are nothing more than coordination sessions, not policy-making meetings.

The City does **not** coordinate with the Department of Defense for military aircraft. Salute is solely responsible for the preparation and filing of the DD Form 2535, "Request for Military Aerial Support," with the Department of Defense. Exhibits 6 and 7.

Salute is the official "Sponsor" of the air show on the DD Form 2535s, and the City merely certifies the airport as the site and provides normal public safety services.

The City does **not** arrange public transportation to and from the airport for Salute. It was undisputed that a private contractor, "First Student Transportation," owns and operates the school buses that are used as shuttles to the air show. Posner Depo. at 240. There was no evidence that the City contracted for the buses or paid the private contractor anything to operate the buses during the air show. Invitees pay $2 for shuttle bus service. Exhibits 6 and 7.

Two other matters deserve a brief comment. At page 5 of their brief, respondents refer to testimony by Capt. Martin about going so far as to remove someone on account of race. That was a thoughtless answer to a hypothetical question that Capt. Martin recanted in his later testimony. He was never asked to remove anyone on account of race. Salute has never discriminated on the basis of race. Many of its honored guests are African-American veterans. Race is not an issue in this case.

The fact that the air show is open to the public without charge does not mean that the invitees are free to do whatever they want on the fenced tarmac.[1] Military air shows are also open to the public free of charge, but there are strict rules in place, and anyone who breaks the rules is escorted off the air show

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[1] In this brief, petitioner is using the term "fenced tarmac" instead of "secured tarmac." The terms mean the same thing, but the former may be more indicative of the fact that a fence separates the air show from the other public areas.

grounds and given an exclusion letter by the base commander.

ARGUMENT

In their brief, respondents attempt to marginalize Salute's points by trying to turn the case into a factual dispute. Salute is not seeking fact bound error correction. Based on the undisputed, relevant facts, the appeal would have been decided in Salute's favor if it had been in the Fourth of Sixth Circuits. Salute would not be a state actor for purposes of 42 U.S.C. §1983 under either *UAW Local 5285 v. Gaston Festivals*, 43 F.3d 902 (4th Cir. 1995), or *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000).

On the *Hurley* issue, the Eighth Circuit decision denying protection to Salute's First Amendment right to its own message is not "in line" with decisions of the Sixth, Ninth and D.C. Circuits. Respondents' resort to "crowd" analysis misses the point and ignores the fact that the fenced tarmac is at the heart of the air show and part of the Memorial Day message.

I. Petitioner is not seeking fact bound error correction. The decision of the Eighth Circuit would have been opposite on the state action issue if the appeal had been to the Fourth or Sixth Circuits.

Taking the Sixth Circuit decision first, the factual parallels between the *Lansing* opinion and the case at bar are exceedingly close. In both, the non-governmental organizer ("NGO") leased public property for an annual, themed event. In both, the NGO had rules against other expressive activities

inside clearly marked boundaries for the event area. In both, expressive activities on public property immediately outside the event boundaries were not restricted in any way. In both, the plaintiffs went inside the marked boundaries for the purpose of expressing messages not consistent with the event's theme. In both, a city policeman enforced the NGO's rules against other messages inside the event boundaries. In both, the city retained authority over public services, such as fire and police protection. In *Lansing*, there was even more extensive involvement by public officials in governance. Two of them were on the NGO's governing board. There were and are none on Salute's governing board. Based on all these facts and circumstances, the Sixth Circuit held that the NGO was not a state actor for purposes of 42 U.S.C. §1983.

The Fourth Circuit's decision in *Gaston* is also at odds with the Eighth Circuit, in spite of respondents' attempts to distinguish it. The issue in *Gaston* was whether the NGO engaged in state action when it organized and managed the annual "Fish Camp Jam" festival. The NGO denied booth space to the UAW, which meant the UAW could not pass out leaflets on the festival grounds. Despite evidence of extensive municipal involvement and support, including police services, the court found that the NGO was not a state actor under 42 U.S.C. §1983. The fact that the city issued a permit for the use of the public property and retained the right to re-enter, just as the City of Columbia did in the instant case, showed that the NGO was not a state actor. 43 F.3d at 910. The fact that the union members were able to freely distribute leaflets outside the festival grounds, just as respondents were allowed to do in this case, was a significant factor in

holding that the NGO was not engaged in state action. Id.

At page 14 of their brief, respondents state that the plaintiff in *Gaston* conceded the absence of a close nexus and cite footnote 4. But they failed to quote an important phrase in footnote 4 that says: "as this case is presently postured," there is an insufficient nexus. 43 F.3d at 909, n. 4. The term "presently postured" referred to the fact that the UAW had argued that the event itself was a governmental function. For strategic reasons, they did not try to mix a nexus argument with this.

In any event, footnote 4 in *Gaston* is irrelevant because the Eighth Circuit did not base its decision on a pure nexus analysis for the air show as a whole. Its state action holding was based on the conclusion that "Salute and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions...." Pet. App. 15a. In other words, it was all about the police. On that ground, the Eighth Circuit decision is in direct conflict with *Lansing* and *Gaston*, both of which recognized that the police can provide services without making the NGO a state actor. 202 F.3d at 831 & 833; 43 F.3d at 909.

In the final analysis, no one test is determinative. The Court looks to the totality of the circumstances. Viewed in that light, the conclusion is inescapable that if the Memorial Day air show were in any of the states within the Fourth or Sixth Circuits, Salute would not be a state actor and the protestors would be outside the fenced tarmac, where they always were before this suit was filed.

The five cases cited by respondents from the First, Seventh and Ninth Circuits do not support their argument and are certainly not "precisely in line" with

the Eighth Circuit decision, as respondents contend at page 8 of their brief. Each of the five cases cited by respondents will be distinguished in turn.

In *D'Amario v. Providence Civic Center Auth.*, 783 F.2d 1 (1st Cir. 1986), a divided court held that enforcement of the "no-camera" rule for performances at the publicly owned and publicly operated Providence Civic Center supplied the state action nexus for jurisdiction under 42 U.S.C. §1983. The majority opinion based its holding on evidence that the venue was owned and operated by a public corporation, the Providence Civic Center Authority, and that it was the Authority's governmental employees who enforced the challenged rule. Contrast this with Salute's status. It is a private corporation, and its volunteers are not governmental employees.

Air Line Pilots Assoc. v. Department of Aviation, 45 F.3d 1144 (7th Cir. 1995), is also easily distinguished. The forum in *Air Line Pilots* was the display cases at the Chicago O'Hare airport. The pilots union wanted to display a message critical of United Air Lines. The contractor in charge of the display cases, TMI, refused, on direct orders from the City (under pressure from UAL). State action exists when the government exercises coercive power. *Id.* at 1150. In contrast, there was no coercive power exercised by the City of Columbia over Salute. Keeping extraneous messages out of its Memorial Day event was Salute's idea, not the City's.

Lee v. Katz, 276 F.3d 550 (9th Cir. 2002), was a §1983 action by street preachers to enjoin the Oregon Arena Corporation ("OAC") from enforcing a rule against preaching at the city-owned Rose Quarter Commons, a large open-air plaza. OAC conceded that the Commons was a traditional public forum, which

made the regulation of speech a public function. *Id.* at 556. This is not the rule for a nonpublic forum, like the City of Columbia's fenced tarmac during the air show. In a nonpublic forum, regulation of speech at a themed event by an NGO is not a public function.

ACLU v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003), is not in point, because the state actor status of a private entity was **not** at issue. The City of Las Vegas had permanently converted five blocks of Fremont Street into the "Fremont Street Experience," placed the area under the control of the Fremont Street Experience, LLC ("FSELLC") and prohibited unapproved expressive activities by others. The primary issue on appeal was whether the "Fremont Street Experience" had turned a traditional public forum into a nonpublic forum (the circuit court held that Fremont Street was still a traditional public forum). The status of FSELLC was not in dispute. "Neither party contests the premise that FSELLC is a state actor,..." *Id.* at 1098, n. 5.

Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983), held that a landlords' use of the police to evict tenants from a trailer without judicial process made the landlords a state actor. The landlords used the police presence to cloak themselves with state authority. The result was in line with decisions of this Court holding that police aid in a repossession of property constitutes state action. Nothing remotely close happened during the Memorial Day air show.

II. The fenced tarmac during the air show is at the heart of the event and is an integral part of the Memorial Day message. It is not like a sidewalk next to a parade. The "sidewalk" in this case is the area outside the fence.

How one frames the ultimate facts in a First Amendment case will frequently determine the outcome. That is why this Court will undertake its own independent review of the facts. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

In point II of their brief, pages 18 to 20, respondents argue that Salute is not entitled to First Amendment protection for its Memorial Day theme on the fenced tarmac because that area is akin to a sidewalk by a parade. This argument overlooks substantial differences. There are static aircraft displays on the fenced tarmac. Pet. App. 2a. The solemn noontime ceremony to honor fallen veterans is on the fenced tarmac. Pet. App. 3a. The national anthem is played on the fenced tarmac. Id. Honored guests, such as the Tuskegee Airmen, are introduced and honored on the fenced tarmac. Id.

To say that the fenced tarmac is not part of the air show is like saying the exhibition area is not part of a convention. To bring the issue closer to home, how would the American Bar Association have reacted if people opposed to the rule of law had invaded the exhibition area in the Muscone Center in San Francisco at the recent ABA Annual Meeting and demanded the right to leaflet, petition, and engage in other expressive activities at odds with the ABA's core values? Even though the Muscone Center is public property, would any reasonable person buy into the argument that the

plenary sessions were the "parade" and therefore the display areas were the "sidewalk," open and available for a First Amendment free-for-all?

Respondents' argument at page 20 of their brief that "the crowd was not part of Salute's message" is at odds with this Court's focus on the forum, not the "crowd." The argument also ignores the undisputed facts in this case. Respondents were not barred from being part of a non-expressive "crowd." They became expressive units when they went onto the fenced tarmac for the express purpose of espousing messages either at odds with or extraneous to the Memorial Day theme. As such, they tried to make themselves part of the "parade" that Salute sponsored.

None of the cases cited by respondents support their position under Point II. In *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005), the plaintiff was allowed to preach in the streets, because the streets remained a traditional public forum during an arts festival. The fenced tarmac is a nonpublic forum. *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006), was another case filed by a street preacher, to secure his right to preach in a traditional public forum. *Mahoney v. Babbit*, 105 F.3d 1452 (D.C. Cir. 1997), protected the right of people on the sidewalk to hold protest signs along a parade route. *Mahoney* stands for the proposition that respondents should be outside the fenced tarmac, as in former years.

CONCLUSION

The Memorial Day air show has a theme in keeping with the national holiday to honor and remember veterans. Activities on the secured tarmac are part of the air show. Petitioner and other non-governmental organizers of public events across the nation should be allowed to sponsor the same or similar events without the intrusion of other messages and without becoming state actors under 42 U.S.C. §1983. This is a matter of national interest and importance, and non-governmental organizers of air shows and other themed events across the country are in need of review by this Court, to bring the Eighth Circuit in line with the well-reasoned opinions from the Fourth and Sixth Circuits. Respectfully, certiorari should be granted.

Respectfully submitted,

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